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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LESLIE BRAGG, Defendant and Appellant.	B225342 (Los Angeles County Super. Ct. No. NA039855)

THE COURT:*

Leslie Bragg (appellant) appeals from the denial of his April 8, 2010 application for a hearing in absentia under Penal Code section 1202.4, subdivision (f),[1] or, in the alternative, for a waiver or reduction of a restitution order. Appellant also moved for appointment of counsel.

We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "Opening Brief" containing an acknowledgment that she had been unable to find any arguable issues. On September 30, 2010, we advised appellant

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* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

1 All further references to statutes are to the Penal Code unless stated otherwise.

that he had 30 days within which to personally submit any contentions or issues that he wished us to consider.

After being granted an extension of time, appellant filed a supplemental brief on December 3, 2010. He argues that, under the Fifth, Sixth, and Fourteenth Amendments, he must be afforded a new hearing to determine the amount of his restitution fine.

On September 2, 1999, after a jury convicted appellant of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), the trial court sentenced him to a term of 25 years to life under the Three Strikes Law and an additional three years under section 667.5, subdivision (b) for having served three prior prison terms.[2] The trial court also ordered appellant to pay "a $5,000 restitution fund payment" and stayed a $5,000 payment pursuant to section 1202.45.

In case No. B135273, this court modified appellant's award of credit days and otherwise affirmed the judgment on appeal. In that appeal, appellant argued, inter alia, that the trial court's restitution order was ambiguous as to whether the order was issued pursuant to section 1202.4, subdivision (b). He further argued that, if the trial court did so order, the amount of $5,000 was an abuse of discretion. We determined that the record in context clearly showed that the $5,000 fine was for the restitution fund under section 1202.4, subdivision (b). We concluded that the claim that the fine constituted an abuse of discretion was forfeited for failure to object below and that, in any event, the fine was not excessive based on the record presented.

In his current appeal, appellant argues against the superior court's summary denial of his application for a hearing in absentia under section 1202.4, subdivision (f) and for appointment of counsel. Appellant asked the court to determine whether any claim for restitution had been made for any victim. In the alternative, appellant asked for a "waiver" or a reduction of the "direct order/fine."

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[2] On September 29, 2010, we granted appellant's request to take judicial notice of our unpublished opinion filed December 26, 2000, *People v. Leslie Bragg* (case No. B135273) as well as the transcript of appellant's sentencing hearing on September 2, 1999.

Section 1202.4, subdivision (f) provides that a defendant must make restitution to a victim who suffered economic loss as a result of the defendant's conduct. Since there was no victim restitution ordered in appellant's case, there was no need for a hearing on this issue, and appellant's application for such hearing and appointment of counsel to represent him at the hearing was properly denied.

In his application, appellant made passing references to his trial counsel's failure to object to the amount of his restitution fine. In appealing from the denial of his application, appellant complains more forcefully that his trial counsel failed to argue against imposition of the amount of $5,000 as a restitution fine, although appellant still refers to it incorrectly as victim restitution. Appellant claims that trial counsel's failure to argue, at a minimum, appellant's inability to pay resulted in appellant being deprived of his property without due process in violation of the Fifth Amendment of the federal Constitution. He argues that he was also denied effective assistance of counsel under the Sixth Amendment. Appellant asserts that, after many years of incarceration, he has managed to pay less than 20 percent of the restitution fine.

We noted in our opinion in case No. B135273 that counsel failed to object to the amount of restitution and that this issue was thereby forfeited. Appellant did not raise an ineffective assistance of counsel claim related to this issue in case No. B135273. Appellant has presented nothing in the current appeal that would warrant our considering it to be a petition for a writ of habeas corpus based on a claim of ineffective assistance of counsel.

We observe that section 1202.4, subdivision (b)(1) provides that the restitution-fund fine shall be set at the discretion of the trial court. Section 1202.4, subdivision (b)(2) provides that, when setting a felony restitution fine, the trial court may determine the amount of the fine by multiplying the sum of $200 by the number of years of imprisonment the defendant is to serve, and then multiplying that amount by the number of the defendant's current felony convictions. It appears the trial court employed this formula as the basis for the restitution fine. In determining whether a defendant has the ability to pay, a court may consider not only his present status, but his future ability to

pay, including his ability to earn wages while in prison and after his release. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376–1378.) Neither a separate hearing nor express findings are required for imposition of a restitution-fund fine under section 1202.4, subdivision (b). (§ 1202.4, subd. (d).) The record need only contain evidence in support of an implied determination of ability to pay. (*People v. Hennessey*, *supra*, 37 Cal.App.4th at pp. 1836–1837.) As we stated in case No. 135273, appellant's fine was not excessive on the record presented.

Therefore, on the record before us, it does not appear that trial counsel's failure to argue against the amount of the restitution fine suggested by the statute prejudiced appellant. In its discussion of reasons for denying appellant's *Romero*[3] motion, quoted at length in our unpublished opinion, the trial court made it clear that it was not disposed to leniency in appellant's case.

We have examined the entire record, and we are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The order under review is affirmed.

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3 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).